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“WE’VE GOT TO GET WORKING. . . . THE CLOCK IS TICKING”: EQUITY IN EDUCATION AND THE LEGACY OF *BROWN V. BOARD*

KERMIT L. HALL*

I. INTRODUCTION

Alphonse Fletcher, Jr., is a black philanthropist in New York City, who attributes his success to his aspiring parents, his education, and to the Supreme Court’s decision in *Brown v. Board of Education*.¹ Fletcher has set aside \$50 million to be spent over the next quarter century to help realize what he views as the unfinished agenda of *Brown*.² His benevolence reminds us, as if we needed any reminding, that considerable work remains, probably more than \$50 million can purchase. We will return to Mr. Fletcher and his dreams at the end.

The purposes of this brief essay are fourfold. The first is to place *Brown* in its appropriate historical perspective, especially in light of the increasingly conflicting judgments about the importance of the decision and what it accomplished. Second, any effort to assess *Brown* today must also take account of the development over the last half-century of the color line in American society. Third, we need to understand the issues surrounding the problem of equality and especially the ways in which, in the past fifty years, the nation’s and the Court’s understanding of that word has changed. And fourth, and finally, *Brown* must be understood in the context of the much-discussed “racial gap” in learning and educational achievement, not just for K-12, but for higher education as well.

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1. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); Sara Rimer, *\$50 Million Gift Aims to Further Legacy of Brown Case*, N.Y. TIMES, May 18, 2004, at B2.

2. Rimer, *supra* note 1, at B2.

Covering these points in brief compass is a formidable task, but one certainly worthy of Alphonse Fletcher's admonition: "We've got to get working. . . . The clock is ticking."³

As Paul Finkelman has explained in his insightful analysis of *Brown*, the decision was the most significant action by the High Court in the twentieth century.⁴ "When it was decided fifty years ago, *Brown v. Board of Education*⁵ seemed like a revolution in law and justice."⁶ It ranked, in terms of its impact, along with *Dred Scott v. Sanford*,⁷ as the most important decision in the entire history of the Court.⁸ Thurgood Marshall, who argued the case for the National Association for the Advancement of Colored People ("NAACP") and later was appointed by President Lyndon Johnson to the High Court, was delighted. Richard Kluger, who has written the best history of the case, reported that when Marshall heard about the result, he stated, "I was so happy I was numb."⁹ Today, many scholars rank *Brown* as the single most honored opinion in that institution's history.¹⁰

Ironically, on this fiftieth anniversary of *Brown*, critics now proclaim the decision a failure.¹¹ As Finkelman reports, the list of naysayers is impressive. Harvard law professor Charles Ogletree, for example, has reached the "sad conclusion . . . that fifty years after *Brown* there is little left to celebrate."¹² Derrick Bell, a former member of the Harvard faculty and a civil rights activist, has gone even further. He concludes that the decision was actually harmful. According to Bell, the Court failed to assert its full power, both in deciding the issues and then demanding implementation, with the result that the decision "accomplished . . . little."¹³

3. *Id.* (quoting Alphonse Fletcher, Jr.).

4. Paul Finkelman, *Civil Rights in Historical Context: In Defense of Brown*, 118 HARV. L. REV. 973, 973 (2005) (book review) (offering an extended analysis of the attack on *Brown* and the Warren Court in failing to act more aggressively to deal with issues of racism). I have borrowed extensively from Finkelman in addressing these issues.

5. 347 U.S. 483 (1954).

6. Finkelman, *supra* note 4, at 973.

7. 60 U.S. 393 (1957).

8. RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* 709 (1976).

9. *Id.* at 714.

10. JACK GREENBERG, *CRUSADERS IN THE COURTS* 197 (1994).

11. Finkelman, *supra* note 4, at 974.

12. *Id.* (quoting CHARLES J. OGLETREE, JR., *ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF CENTURY OF BROWN V. BOARD OF EDUCATION* xv (2004)).

13. *Id.* (quoting Derrick A. Bell, *Bell, J., Dissenting*, in JACK M. BALKIN, *WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS*

Bell even suggested that the Court should not have overturned the “separate but equal” doctrine set out in *Plessy v. Ferguson*.¹⁴ Instead, the Justices should have demanded that every state—Northern and Southern—enforce fully the “equal” component of “separate but equal.”¹⁵ If they had done so, the result would have been more money and better educations for all students, black and white.¹⁶ Bell proposed nothing short of adopting the tactic of John W. Davis, the attorney for the losing school board. Davis argued that the best solution was to pour more money into black schools, not force white and black children to go to school together.¹⁷

Bell’s ideas are given something of a sophisticated and scholarly echo in Michael Klarman’s new book, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality*.¹⁸ Klarman, a law professor at the University of Virginia, claims that the Supreme Court played a limited role a half century ago just as it does today in settling matters of race relations.¹⁹ The Justices, according to Klarman, generally reflect prevailing public opinion, and that, as a result, *Brown* was at once a constitutional and social failure. He believes that civil rights advocates were making great progress in the decade before *Brown* and thus argues that “[w]ithout *Brown*, negotiation might have continued to produce gradual change without inciting white violence.”²⁰ While conceding that *Brown* was not “irrelevant” to civil rights, he argues that it led to unnecessary violence, “inspired southern whites to try to destroy the NAACP,” and in the end was not central to changing American race relations.²¹ According to Klarman, it was not *Brown*, but “deep background forces” that “ensured that the United States would experience a racial reform movement regardless of what the Supreme

REWRITE AMERICA’S LANDMARK CIVIL RIGHTS DECISION 185, 199 (Jack M. Balkin ed., 2001)).

14. 163 U.S. 537 (1896); Finkelman, *supra* note 4, at 974-75.

15. Finkelman, *supra* note 4, at 974-75.

16. Bell, *supra* note 13, at 186-87.

17. *Id.* at 196.

18. MICHAEL KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* (2004).

19. *See id.* at 442.

20. *Id.* at 442.

21. *Id.* at 468. Klarman’s book has received substantial criticism, notably because it is so unrealistic about the pressures playing on the Court and American society at the time. In short, it is a law professor’s history of what should have been—one based on perfect hindsight. *See* David J. Garrow, “Happy” Birthday, *Brown v. Board of Education? Brown’s Fiftieth Anniversary and the New Critics of Supreme Court Muscularity*, 90 VA. L. REV. 693 (2004).

Court did or did not do.”²²

Klarman’s book and the response to it remind us that considerable disagreement exists among scholars about *Brown* and especially how best to assess its impact.²³ My own position is fundamentally different from that of Klarman. *Brown* made a real difference, but we have used it to explain too much and, in the end, raised expectations about it that are far beyond anything that it could ever have delivered. The Supreme Court cannot, and we should not expect it alone to, produce a color-blind society of genuine equality.

Since the critics of *Brown* and the High Court rely on counterfactual arguments to make their case, it seems fair to turn the tables. As Finkelman has written in his cogent review of Klarman’s book, we might profitably ask ourselves these questions:

[W]hat would have happened if the Court in 1954 had upheld segregated schools, reaffirmed separate but equal, and done little more than to tell the South that it must spend more money to equalize black schools[?] Would that have inspired a civil rights movement? Would Rosa Parks have been so willing to take the risk of not giving up her seat on a bus?”²⁴

As Finkelman observes, “It is not hard to imagine a very different America if the Court had decided *Brown* differently.”²⁵ And, as Finkelman wisely concludes:

[W]hile [critics of the *Brown* decision] bemoan[] the violence against blacks after *Brown*, it is easy to imagine a much more violent and lethal civil rights movement in the 1950s and 1960s if the Court in *Brown* and its progeny had not been a stalwart friend and supporter of civil rights.²⁶

The arguments of Klarman and others have merit, of course. It

22. KLARMAN, *supra* note 18, at 468.

23. See Neil G. Williams, *Brown v. Board of Education Fifty Years Later: What Makes for Greatness in a Legal Opinion?*, 36 LOY. U. CHI. L.J. 177 (2004).

24. Finkelman, *supra* note 4, at 976.

25. *Id.*

26. *Id.*

would be a mistake, in the end, to attribute too much to the work of the Court. Yet, the appropriate measure of the Court's success is not what it should have done measured against today's standards, but instead what it did during the 1950s and 1960s measured against the standards of that era. When the issues are framed in that much more authentic historical perspective, *Brown* emerges as one of the great milestones in the course of human rights and freedom. Much of the rest of the world has embraced that conclusion. In international human rights law, *Brown* is one of the most, if not the most, respected American cases.²⁷

II. THE COLOR LINE

One of the reasons that *Brown* has currency among international human rights lawyers is that it dealt directly with the color line in the United States. In 1903 W.E.B. DuBois correctly predicted that the major problem of the twentieth century would be the color line.²⁸ One of the underlying arguments about *Brown* is whether it helped to break that color line.

The impact of *Brown* extended beyond school desegregation. Shortly after the decision, federal judges invoked *Brown* in cases challenging different forms of desegregation.²⁹ These included segregated beaches in Baltimore, golf courses in Atlanta, and public housing in Michigan and Missouri.³⁰ In doing so, *Brown* helped to break down the status of blacks as the nation's official pariahs. For example, by the early 1980s, at least according to public opinion surveys, the color line was close to disappearing completely.³¹ Ninety-four percent of both black and white Americans subscribed to the principle that black and white children should go to the same schools.³²

27. See Maria Marcus, *Fifty Years of Reflection: Brown v. Board of Education and Its Universal Implications: Austria's Pre-War Brown v. Board of Education*, 32 FORDHAM URB. L.J. 1 (2004).

28. David G. DuBois, *Erasing the Color Line: Remembering W.E.B. DuBois*, ESSENCE, Oct. 1993, http://www.findarticles.com/p/articles/mi_m1264/is_n6_v24/ai_14439909.

29. See KLUGER, *supra* note 8, at 751.

30. *Id.* at 750-75.

31. Christine Rossell, *Brown and Its Impact on Schools and American Life*, 19 FOCUS ON L. STUD. 1 (John Paul Ryan, ed., Spring 2004), available at http://www.lawofficeconsulting.com/publiced/focus/spring_04.pdf.

32. See Gary Orfield, *Unexpected Costs and Uncertain Gains of Dismantling Segregation*, in DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF BROWN V. BOARD OF EDUCATION 73, 106-12 (Gary Orfield, Susan E. Eaton & Harv. Proj. on Sch. Desegregation eds., 1996); see also David Armor et al., *The Outlook for School Desegregation*, in SCHOOL

Today, save for an extraordinarily few holdouts, racism and the color line that went with it are deemed unacceptable, and racial diversity is viewed as a public good. Corporate America and the military, for example, joined in amicus briefs before the Supreme Court in the recent Michigan affirmative action cases to plead the necessity of just such diversity in elite public institutions of higher education.³³ Such a combination fifty years ago was largely unthinkable.

That said, of course, there is still substantial disagreement about how to achieve diversity and about the grounds on which to use the power of the state to allot some of society's most important rewards and benefits, such as access to a college education. The "how to achieve it" issue is particularly critical, because issues of class and income continue to plague America and to do so along lines often shaped by race as well. We live, today, in a nation where about five percent of all African American men are incarcerated; for black men between ages sixteen and thirty-four, the percentage rises to twelve percent.³⁴ Black males between ages eighteen and twenty-four are almost ten times more likely than white males of the same age to be the victims of homicide.³⁵ Black children are far more likely than white children to live in poverty; their parents are far more likely to be unemployed or to earn low incomes.³⁶

We are also in the middle of a national trend toward school re-segregation.³⁷ That process has pushed more and more African American and Latino students into those schools with seventy-five percent or more minority children.³⁸ Gary Orfield, co-director of Harvard University's Civil Rights Project, released a major research report in 2001 that documented this trend. Among other things, the report says, "[t]he data show the emergence of a substantial group of American schools that are virtually all nonwhite, which we call

DESEGREGATION IN THE 21ST CENTURY 323-24 (Christine Rossell et al. eds., 2002) (suggesting that future school desegregation will be voluntary rather than mandatory).

33. Ronald Dworkin, *The Court and the University*, 72 U. CIN. L. REV. 883, 886 (2004).

34. Charles Stein, *For Black Men, Job Market Hurdles Grow Even Larger*, BOSTON GLOBE, July 31, 2005, at E1.

35. Raymond Gunn, *Being Here and Being There: Fieldwork Encounters and Ethnographic Discoveries: Inner-City "Schoolboy" Life*, 595 ANNALS AM. ACAD. POL. & SOC. SCI. 63, 77-78 (2004).

36. See John Schmid, *Hit by a Global Train*, MILWAUKEE J. SENTINEL, December 5, 2004, at 1A; Thomas Tobin & Denise Watson Batts, *Reading, Writing, Race: A Special Report on the Achievement Gap*, ST. PETERSBURG TIMES, May 17, 2004, at A1.

37. Gary Orfield, CIV. RTS. PROJ.: HARV. U., SCHOOLS MORE SEPARATE: CONSEQUENCES OF A DECADE OF SEGREGATION, 1 (2001), http://www.civilrightsproject.harvard.edu/research/deseg/Schools_More_Separate.pdf.

38. *Id.* at 32.

apartheid schools.”³⁹ These trends remind us that the solutions to problems associated with opportunity for those historically denied it depend on more than the law.

Many school systems outside the South are today more racially segregated than they were in 1954. And in the South, the picture is mixed a half century after *Brown*.⁴⁰ As Erwin Chemerinsky has observed in drawing on the work of the sociologist Gary Orfield, “nationally, the percentage of African-American students attending majority African-American schools and schools where over 90% of the students are African-American also has increased in the last fifteen years.”⁴¹ The percentage of schools where half or more of the student population is African American has been going up since 1986, from 62.9% to 70.2% in 1998-1999.⁴² In North Carolina, between 1993 and 2000 the number of African American students attending schools with minority enrollments of eighty percent or more doubled.⁴³ And in the Charlotte-Mecklenburg School District the percentage of schools that meet the standard definition for diverse has gone down by twenty-five percent.⁴⁴

At the same time, in the University of Michigan affirmative action case of two terms ago, Justice O'Connor was unwilling to invalidate race-based preferences in higher education.⁴⁵ In part, her decision reflected the view that having minority faces in historically majority white institutions was a public good.⁴⁶ And the faces are there. During the administration of President George W. Bush, for example, African Americans occupy the posts of Secretary of State, the national security advisor to the President, and the Secretary of Education, and Clarence Thomas has followed Thurgood Marshall on the Supreme Court. Since 1968, there has been an African American on the High Court. Should

39. ERICA FRANKENBERT, CHUNGMEI LEE, & GARY ORFIELD, CIV. RTS. PROJ.: HARV. U., A MULTI-RACIAL SOCIETY WITH SEGREGATED SCHOOLS: ARE WE LOSING THE DREAM? 5 (2003), <http://www.civilrightsproject.harvard.edu/research/reseg03/AreWeLosingtheDream.pdf>.

40. KLUGER, *supra* note 8, at 3-26.

41. Erwin Chemerinsky, *The Segregation and Resegregation of American Public Education: The Courts' Role*, 81 N.C. L. REV. 1597, 1598 (2003).

42. *Id.*

43. *Id.* at 1598-99.

44. *Id.* at 1599; GARY ORFIELD & CHUNGMEI LEE, CIV. RTS. PROJ.: HARV. U., BROWN AT 50: KING'S DREAM OR PLESSY'S NIGHTMARE? 11 (2004), <http://www.civilrightsproject.harvard.edu/research/reseg04/brown50.pdf>.

45. *Grutter v. Bollinger*, 539 U.S. 306, 324-25 (2002).

46. *Id.*

Thomas leave the High Court, he would almost certainly be replaced by another African American.

These developments were, in 1954, beyond comprehension, and they signal a profound change in American life. Did *Brown* make these developments possible? The answer is clearly yes, although it does not follow that *Brown* alone made them possible.

If we are willing to go back to the period during which the High Court considered *Brown*, it is apparent that the members of the Court viewed the changes taking place then as astounding.⁴⁷ Justice Robert Jackson noted privately that the advances made by blacks since the Civil War were among the most impressive in human history.⁴⁸ Justice Felix Frankfurter agreed, and he even made the point to his colleagues as they deliberated that, in the end, it was these changes that should prompt the Court to support integration.⁴⁹

Finally, *Brown* stirred a massive backlash, one that is hard for Americans who did not live through the decades of the 1950s and 1960s to appreciate. It helped to generate direct action by making Jim Crow seem vulnerable, both to legal attack and to social protest. The *Brown* decision managed to connect the higher law of the Constitution with the higher law vision of Gandhi and Martin Luther King, Jr. Even more importantly, it effectively created the opportunity for the civil rights movement to break the law while remaining legal. And in doing so, it accelerated the demise of white supremacy.

The decision also inspired bold action from the South's white supremacists.⁵⁰ The result was a profoundly radicalized southern politics and the temporary legitimating of such figures as George C. Wallace, Orval Faubus, and Eugene Bull Connor.⁵¹ For both sides, *Brown* was more a catalyst than an igniter. The resulting violence against peaceful civil rights demonstrators mobilized political support nationally and resulted in civil rights and voting rights legislation that struck at the heart of the segregationist empire.⁵²

But *Brown* was strong on rhetoric and weak on implementation, a fact associated with many Supreme Court opinions. In this regard, it is

47. See Finkelman, *supra* note 4, at 973.

48. Michael J. Klarman, *Essay: Brown at 50*, 90 VA. L. REV. 1613, 1621 (2004) (citing Justice Robert H. Jackson, Draft Concurrence at 1, In re School Segregation Cases (Library of Congress, Jackson Papers, Box 184, case file: Segregation Cases)).

49. See *id.*

50. Finkelman, *supra* note 4, at 977.

51. KLARMAN, *supra* note 18, at 385.

52. Finkelman, *supra* note 4, at 1010-17.

important to remember that there were two *Brown* decisions.⁵³ The first, in 1954, made broad, equitable assertions about the way American society should function.⁵⁴ The second *Brown* decision in 1955 sketched the framework for implementing the broad goals of the first decision.⁵⁵ It required that schools be desegregated "with all deliberate speed."⁵⁶

The Justices hedged the moral force and equitable character of the first decision. Implementation became more deliberate than speedy. The Court asserted initially that the Constitution mandates equality, then it backed away nine months later, doing so in the face of political circumstances that it could not control.⁵⁷

Taken together, DuBois' color line remains, but it has been significantly adjusted, and *Brown* played a vital but not conclusive role in that adjustment. The problem today is how to make blacks and other historically under-represented groups successful given the reluctance of the social order to redistribute resources in a way that would facilitate broad change, a point that we will return to at the end. *Brown* at once drew strength from and enhanced the river of change that was running in America. *Brown* clearly deserves credit for beginning the elimination of legally sanctioned segregation. But, as Gerald Rosenberg and others have reminded us, the Supreme Court, for all of its stature, cannot solve the material and de facto problems that remain in our society and that continue in many instances to have their greatest impact along the color line.⁵⁸

People, especially people with means, were free to vote with their feet. And vote they did by moving out of their neighborhoods and moving out of their public schools.⁵⁹

III. EQUALITY

In this sense, *Brown* was all about the meaning of equality. The term, however, has at least two different implications, one legal the other substantive. At the time of the decision, the most important meaning was legal. That is, *Brown* was argued over the question of

53. 349 U.S. 294, 301 (1955); 347 U.S. 483 (1954).

54. 347 U.S. 483 (1954).

55. 349 U.S. 294 at 301 (1955).

56. *Id.*

57. See KLUGER, *supra* note 8, at 745-46.

58. See GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 343 (1991).

59. Balkin, *supra* note 13, at 1571.

whether legal segregation should be brought to an end. Race-based discrimination in public education was wrong because it was unequal—all persons should have the *opportunity* to attend schools of similar quality. And, as Chief Justice Warren emphasized in his opinion for the Court, separate but equal was inherently unequal.⁶⁰

Lurking just below the surface, and in some instances reflected in both the briefs and the decision of the Court, was another substantive meaning to equality. That was an equality of social outcomes—educational achievement, not just access to education. This view, by the way, is one of the reasons that countries such as South Africa have taken such a strong, although often ambivalent, interest in the opinion.⁶¹ It has been used by the courts there to insist, as does the South African Constitution, that the State has a positive obligation to make certain that this and other substantive rights—such as income, health care, and a clean environment—are realized.⁶²

But *Brown* was, at its heart, a legal and constitutional ruling, although as many commentators have noted, it was far more equitable than it was legal.⁶³ That is, the decision aimed at doing the fair, fitting thing, not just propounding the law. While the Court demolished the legal basis of segregation, it made clear that the principal reason was that American society would be the better for doing so. In short, the decision operated in two-part harmony. The major chord was the legal destruction of segregation in public schools, but the minor, yet still important one, was to dignify American society by a moral command to end separate but equal.

The distinction is an important one. First, we tend to overload our expectations about laws and courts. There is no doubt, as the early nineteenth century French visitor to America, Alexis de Tocqueville noted, that Americans have been and are uncommonly consumed with

60. *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954).

61. See Mark S. Kende, *The South African Constitutional Court's Embrace of Socio-Economic Rights: A Comparative Perspective*, 6 CHAP. L. REV. 137, 149 (2003).

62. See, e.g., *Republic of South Africa v. Grootboom*, 2000 (11) BCLR 1169 (CC) at 41 (holding that under the guarantee of the right to housing of South Africa's Constitution, the government had an obligation to "establish a coherent public housing programme directed towards the progressive realisation of the right of access to adequate housing within the State's available means"); Heinz Klug, *Five Years On: How Relevant Is the Constitution to the New South Africa?* 26 VT. L. REV. 803, 806 (2002).

63. See Peter Charles Hoffer, *Brown II and Its Progeny*, in *THE LAW'S CONSCIENCE: EQUITABLE CONSTITUTIONALISM IN AMERICA* 181, 181-98 (1990) (discussing the equitable nature of the ruling).

the belief that law is the end of government.⁶⁴ As a result, Americans tend to attribute an unusual level of authority to the law and to its ability to bring about change.

Second, however, one of the interesting facets of the original Plessy decision was the Court's view in 1896 that law could not change moral beliefs or alter social circumstances to which the majority was committed.⁶⁵ Segregation was unstoppable legally, according to Justice Henry Billings *Brown*, because the law could never reshape the way white people felt about black people.⁶⁶ In that circumstance, he concluded, legal segregation was acceptable as long as its results were equal.⁶⁷

Third, John W. Davis, the lawyer for the school board in *Brown* and some of the other desegregation cases, adopted just such a position.⁶⁸ Davis insisted that it was possible to produce substantive equality while maintaining a bifurcated legal status for whites and black.⁶⁹

Fourth, what is fascinating in all of this is that the NAACP and its Legal Defense Fund agreed on one level with Davis.⁷⁰ They were less interested in forcing unwanted social equality, in which the races would be cheek-by-jowl, but instead sought a legal mandate that the state would spend the money to achieve better classrooms, better schools, better principals, and better teachers.⁷¹

The Supreme Court in general and Chief Justice Earl Warren in particular rejected that approach as itself being discriminatory.⁷² Once again, separate but equal, Warren noted, was inherently unequal.⁷³ As a result, the Court conflated the ideas of legal and substantive equality and left generations to come to read different meanings into what the Justices actually intended to do and, as a result, the significance of what they did.⁷⁴

64. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 217 (J.P. Mayer & May Lerner, eds., George Lawrence, trans., Harper & Row Pubs. 1966) (1817).

65. See KERMIT L. HALL, *THE MAGIC MIRROR: LAW IN AMERICAN HISTORY* 147 (1989).

66. *Id.*

67. Walter F. Pratt, *Plessy v. Ferguson*, in *THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES* 637, 638 (Kermit L. Hall et al. eds., 1992).

68. HALL, *supra* note 65, at 323.

69. KLUGER, *supra* note 8, at 573-74.

70. *Id.* at 214-16, 530, 769-70.

71. *Id.*

72. HALL, *supra* note 65, at 323.

73. *Id.*

74. See *id.* at 323-24.

What seems certain is that legal inequality imposed by segregation statutes and state constitutional provisions disappeared. Jim Crow was buried, but substantive equality did not follow.⁷⁵

But did *Brown* require integration, as some have argued? The initial answer was no. There is nothing in the Court's decision, in the extensive notes left behind by the Justices and their clerks, in the contemporary newspapers, and in public speeches that show the slightest indication that the Court wanted to integrate northern schools, many of which were as heavily segregated as their southern counterparts.⁷⁶

Over time, however, the connection between legal equality and substantive equality—these two threads in the *Brown* decision that were wrapped up in the broad concept of equity—began to merge. Legal equality was increasingly viewed as the means by which to reach the end of substantive equality. It seems, in retrospect, hard to believe that the Justices did not articulate this connection more fully, but then the Court achieved its unanimity by avoiding a commitment to specific outcomes and focusing instead on process.⁷⁷ And it is also abundantly clear that the NAACP expected substantive results—not just better access to schools, but better schools with better teachers and with graduates who would go on to better lives.⁷⁸ Over the next fifteen years, the Justices were forced to come to terms with the broader consequences of the legal sea change they had orchestrated. Just follow the Court's path from *McNeese v. Board of Education*⁷⁹ to *Griffin v. County School Board*⁸⁰ to *Swann v. Charlotte Mecklenburg Board of Education*,⁸¹ and we can see the Court re-charting its position.⁸²

Why did it do so? In short compass, those whom the Justices had

75. *Id.* at 324.

76. Davison M. Douglas, *The Limits of Law in Accomplishing Racial Change: School Segregation in the Pre-Brown North*, 44 UCLA L. REV. 677, 705-10 (1997).

77. See HALL, *supra* note 65, at 324-27.

78. See ROSEMARY C. SALOMONE, *EQUAL EDUCATION UNDER LAW: LEGAL RIGHTS AND FEDERAL POLICY IN THE POST-BROWN ERA 47-76* (1986) (discussing some of these cases and the national desegregation policy during the 1960s, 1970s, and early 1980s).

79. 373 U.S. 668 (1963) (involving districting that led to school segregation and overcrowded conditions of primarily white schools, resulting in transfer of students to black schools and ending in separation of white and black students within the school facility).

80. 377 U.S. 218 (1963) (enjoining Prince Edward County, Virginia from using public funds to support private schools that excluded students on account of race).

81. 402 U.S. 1 (1971) (ruling on busing as means to achieve racial equalization in urban school setting).

82. See SALOMONE, *supra* note 78, at 47-76; HALL, *supra* note 65, at 326-27.

expected to obey the law did not do so.⁸³ Delay was the order of the day; violence emerged as the most dramatic form of resistance. As a result, by 1968 the Justices had moved into the business of requiring action that would produce substantive results and that would also evaluate the efforts of city, county, and state officials on a new scale: whether actual results were achieved. Did blacks attend mixed schools and how many? Were taxpayer dollars being used to achieve improvements in the schools? Was busing of students a workable means of achieving integration? The courts shifted from emphasizing process to measuring outcomes.⁸⁴

This shift helps us understand why commentators today are at odds with one another about the results of *Brown*. It also helps us understand why we continue to overvalue the role of law in promoting social change. There is only so much that courts can do.

These insights are important because both sides of the equation (at least where education was involved) turned out to be badly misguided, if not wrong.

Brown suggested that substantive equality would flow from the equality of educational opportunity produced through the decision. The Justices overestimated the power of law to overcome the pernicious racism that infected twentieth-century America. It also overestimated the power of education alone to counteract that same racism.

The *Brown* decision mustered a great deal of legal will, but it ultimately proved less than successful in mustering what was even more needed—political will. That political will was critical to any effort to allocate the resources necessary to foster substantive equality.

IV. RE-SEGREGATION

While *Brown*'s consequences flowed in many directions, it was ultimately a decision about education, principally K-12, and its future. According to the Harvard Project on School Desegregation, southern schools are becoming increasingly segregated.⁸⁵ That is, the hope that the races in the South would come to learn together is receding. And, perhaps as important, the gap between white and Asian students and

83. See HALL, *supra* note 65, at 324-25.

84. *Id.* at 326-27.

85. See Gary Orfield, *Turning Back to Segregation*, in DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF *BROWN V. BOARD OF EDUCATION*, *supra* note 32, at 14-22.

the gap between African American and Latino students are growing.⁸⁶

Why, we might ask, after a half-century of *Brown* have things changed so much yet stayed the same? And what is to be done to address these matters?

First, we need to remember what those who initiated *Brown* had as their vision. The black educators who supported the NAACP wanted to have equality of facilities for black children and a caring environment.⁸⁷ They never expected to exchange one for the other.⁸⁸ Black educators and the communities in which they lived wished to have both equality in school structures and high expectations.⁸⁹ Today's educational rhetoric, especially that associated with the No Child Left Behind Act of 2001,⁹⁰ too often carries the implication that failing schools do so because they are black rather than blacks fail because of their schools.⁹¹

While integrated education still seems a worthy ideal, it also seems clear that the form of integration practiced in the wake of *Brown* did not work. Integration came to mean the one-way relocation of black and Latino children into hostile environments formerly dedicated to keeping them out. In short, black and Latino students were usually expected to conform to the standards of white educators, students, and administrators.⁹² Integration meant stepping up to the better white schools; in practice, especially in light of pervasive residential segregation, for many whites it meant stepping down to the practices of poorer black schools.⁹³

86. See GARY ORFIELD & JOHN T. YUN, CIV. RTS. PROJ.: HARV. U., RESEGREGATION IN AMERICAN SCHOOLS 16-17 (1999), http://www.civilrightsproject.harvard.edu/research/deseg/Resegregation_American_Schools99.pdf; see generally RACE, POVERTY, AND AMERICAN CITIES (John Charles Boger & Judith Welch Wegner eds., 1996) (providing a collection of essays that explore the relationship between race and poverty in America's urban centers).

87. JAMES ANDERSON & DARA N. BYRNE, THE UNFINISHED AGENDA OF *BROWN V. BOARD OF EDUCATION* xvii-xxiv (2004).

88. See Kara Miles Turner, *Both Victors and Victims: Prince Edward County, Virginia, the NAACP, and Brown*, 90 VA. L. REV. 1667, 1671 (2004); Mary Hatwood Futrell, *The Impact of the Brown Decision on African American Educators*, in THE UNFINISHED AGENDA OF *BROWN V. BOARD OF EDUCATION* 79-93 (James Anderson et al. eds., 2004).

89. *Id.*

90. No Child Left Behind Act of 2001, 20 U.S.C.A. § 6301 *et seq.* (West 2003 & Supp. 2005).

91. See James E. Ryan, *Brown, School Choice, and the Suburban Veto*, 90 VA. L. REV. 1635, 1647 (2004).

92. See Kenneth L. Karst, *Law, Cultural Conflict, and the Socialization of Children*, 91 CAL. L. REV. 967 (2003).

93. See Gary Orfield et al., *Deepening Segregation in American Public Schools: A Special Report from the Harvard Project on School Desegregation*, 30 EQUITY & EXCELLENCE IN

Moreover, the path to breaking down segregation emerged only gradually, as one might expect after more than seventy years of official support.⁹⁴ In the first decade after *Brown*, there was neither pressure for desegregation nor much desegregation.⁹⁵ Ten years after *Brown*, barely one percent of black school children in the eleven southern states required to end segregation attended schools with white children.⁹⁶ Change came only after the adoption of Title VI of the 1964 Civil Rights Act,⁹⁷ the 1965 Elementary and Secondary Education Act,⁹⁸ and the federal dollars that both made available and the threat of losing those same dollars if there was no compliance.

The problem was that many whites did not accept desegregation. There is an old line that the genius of America is the ability of its people to hold contradictory ideas simultaneously. In the 1840s and 1850s, for example, the anti-slavery founders of the Republican Party believed deeply in the idea of free soil and free labor, but they were equally committed to the idea that blacks were inherently inferior and that while they might not deserve the status of slaves, it did not follow that they should be accorded unalloyed liberty.⁹⁹

Much the same is true of many contemporary Americans, who believe that segregation is wrong but are quick to pack the family off to suburbs to escape all of the problems associated with the decline of the city, including black schools.¹⁰⁰ Today, for example, in the city of Chicago, only approximately nine percent of public-school children are white, although the white population of the city is approximately forty-two percent.¹⁰¹ Indeed, over two-thirds of black children in Illinois attended majority black schools last year.¹⁰² Moreover, forty-percent of

EDUC. (Sept. 1997), at 2, 5, 12.

94. See KLUGER, *supra* note 8, at 748-78.

95. *Id.*

96. ROSENBERG, *supra* note 58, at 8.

97. Civil Rights Act of 1964, Title VI, Pub. L. No. 88-352, 78 Stat. 252 (codified as amended in scattered sections of 42 U.S.C.).

98. Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27 (codified as amended in scattered sections of 20 U.S.C.).

99. ERIC FONER, *FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR* 76-80, 130-59, 296 (reprint ed., 1995).

100. Bridget Samburg, *What Will It Take for Boston to Become Less Segregated?*, BOSTON GLOBE, April 17, 2005, at 14.

101. Kate N. Grossman, *Small but Happy Minority: Whites Like Kenwood, but High School Can't Attract Many of Them*, CHICAGO SUN TIMES, July 23, 2003, at 8; Chicago City, Illinois Statistics and Demographics (U.S. Census 2000), <http://chicago.areaconnect.com/statistics.htm> (citing 41.97 percent).

102. Gerald Rosenberg, *Brown and Its Impact on Schools and American Life: A*

these black children attend one of the state's 335 schools on academic watch, where students have failed state tests and other standards for four years in a row.¹⁰³ Less than one percent of white children attend those schools.¹⁰⁴ In short, in Illinois, separate but equal remains the reality for many black school children fifty years after *Brown*.

Then there is the language of gaps, such as the "learning gap." That term assumes that all students are equally positioned in contemporary public education and that through standardized testing and curricular mandates it becomes possible to close the gap between white and historically under-represented groups.¹⁰⁵ This language is also one of the inheritances of *Brown*—one that comes essentially from John Davis and the school board's perspective. It says that if we simply create better schools and better teachers, no matter the racial make-up, the gap will close.

Today, the problem is even more challenging since we now live in a society in which discrimination based on race is no longer legal. It would seem, then, that the gap should be easier to close with just more hard work and structural changes.

One of the striking features of the *Brown* decision is the faith that it placed in public schooling. In essence, the Court viewed low achievement as primarily a symptom of disfranchisement, rather than a cause. Yet there seems little doubt that closing the learning gap will require something more, and probably something more than the rhetoric of "No Child Left Behind."

We are all hard pressed to object to a public policy aimed at equality. We want children to achieve, and we would be wrong to reject a policy that aims to do just that. Yet the language of leaving no child behind masks some fundamental differences that must be addressed if the structures aimed at eradicating inequality of opportunity are to be widely adopted by those who must implement them.¹⁰⁶

Fundamentally, the conversation most needed is not merely about structures and tests, but about money—a matter not fully addressed by

Dialogue, 19 FOCUS ON L. STUD. 8 (John Paul Ryan ed., 2004), available at http://www.lawofficeconsulting.com/publiced/focus/spring_04.pdf.

103. *Id.*

104. See generally *Hard Work for Good Schools: Facts, Not Fads*, in TITLE I REFORM, THE CIVIL RIGHTS PROJECT (Gary Orfield & Elizabeth DeBray eds., 2000).

105. *Id.*

106. See Michael Heise, *The Courts, Educational Policy, and Unintended Consequences*, 11 CORNELL J. L. & PUB. POL'Y 633, 641-57 (2002).

No Child Left Behind.¹⁰⁷ That means that a meaningful effort to close the gap in learning must be matched by a corresponding effort to close the gap in such areas as housing, hiring, and health care. Education is surely a public good in order to realize a democratic society. To their credit, Davis and the school boards who fought against desegregation realized as much.¹⁰⁸ They made the telling point, lost on us today, that well funded schools were essential to student success.¹⁰⁹ Ironically, they recognized that it is not so much a matter of leaving no child behind as it is making certain that no school is left behind.

But access to education, as the history of *Brown* teaches us, is not a sufficient condition. As Vanessa Siddle Walker reminds us, there remain three powerful facts about the post-*Brown* world in which we live.¹¹⁰ First, one-third of black children in high-poverty schools are taught by teachers out of field.¹¹¹ Second, minority schools are three times as likely to have a teacher with three or fewer years of teaching experience and a teacher absentee rate averaging six to ten percent per day.¹¹² And third, black children are often in schools with larger class sizes, less technology, greater concerns about safety, and more severe challenges for parental involvement.¹¹³ Acknowledging these inequities might help to transform the debate over the learning gap into a meaningful dialogue about the resource gap.

These same issues echo through public higher education. While affirmative action is an important and logical tool to use in addressing the issues raised by *Brown*, it is clear that admissions policies by themselves do not write the entire text for the future of access and success in higher education. In many states, the fastest growing part of the population is from historically under-represented groups with little prior experience in higher education.¹¹⁴ The Supreme Court's recent decision in *Grutter* providing access to a select number of students from these historically under-represented groups to America's most selective institutions is welcome, but it is far from a solution.¹¹⁵ That is because,

107. John Dayton & Anne Dupre, *School Funding Litigation: Who's Winning the War?*, 57 VAND. L. REV. 2351, 2396-97 (2004).

108. See KLUGER, *supra* note 8, at 543-47.

109. ANDERSON & BYRNE, *supra* note 87, at 48-49, 86-88.

110. Rossell, *supra* note 31, at 13.

111. *Id.*

112. *Id.*

113. *Id.*

114. Kermit L. Hall, *The Biggest Barrier to College Isn't Race*, CHRONICLE HIGHER EDUC., June 20, 2003, at B20.

115. *Id.*

as reports from the American Council on Education (“ACE”) regularly make clear, the single greatest barrier to higher education for most students—and minority students especially—is not admissions policies.¹¹⁶ “Rather, it is the inability of applicants to gain a sufficient financial foothold to enter, persist in, and then graduate from any institution—selective or not.”¹¹⁷

Students of all kinds face an increasingly perilous set of economic circumstances. According to ACE, about seventy-seven percent of undergraduates at four-year colleges and universities have jobs, and twenty-six percent work full-time while in school.¹¹⁸ Budget shortfalls have prompted many states to slash spending on direct college aid for students at the same time that many public universities have raised tuition and fees.¹¹⁹ Administrators have tried to persuade public officials that higher costs are okay since the immediate costs of going to college have to be measured against future earnings potential of graduates.¹²⁰ A college graduate will earn \$1 million more than a high school graduate over a lifetime.¹²¹

Administrators also insist that higher education is a bargain. They point to a report from the College Board that reveals that almost fifty percent of American college students attend schools whose tuition and fees are less than \$6000 a year, and seventy percent attend schools that cost less than \$8000.¹²² The College Board also reports that financial aid received by students reached record levels again in 2004—\$122 billion.¹²³

But in many ways such claims are self-defeating. Much of the aid comes in the form of loans, instead of grants, leaving many students burdened with debt for years after they leave school.¹²⁴ And scholarships, long directed at needy students, are increasingly being

116. *Id.*

117. *Id.*

118. U.S. DEP'T OF EDUC., CTR. FOR POL'Y ANALYSIS, NATIONAL POSTSECONDARY STUDENT AID STUDY: 2004 UNDERGRADUATE STUDENTS (2004).

119. *The “Silent Killer” of Minority Enrollments*, CHRONICLE HIGHER EDUC., June 20, 2003, at A17.

120. *Data Show Value of a College Degree*, CHRONICLE HIGHER EDUC., April 8, 2005, at A22.

121. Eric Hoover, *College Graduates Earn \$17,800 More, on Average, Than Peers With High-School Diplomas*, CHRONICLE HIGHER EDUC., January 7, 2005, at A41.

122. See *2004-05 College Costs Keep Rising Prices in Perspective*, COLLEGE BD., <http://www.collegeboard.com/article/0,3868,6-29-0-4494,00.html>.

123. See *Trends in Student Aid 2004*, COLLEGE BD., at 4, http://www.collegeboard.com/-prod_downloads/press/cost04/TrendinStudentAid2004.pdf.

124. *Id.*

awarded on the basis of merit rather than need.¹²⁵ Limited scholarship funds and rising tuition costs will prevent more than four million qualified high school graduates this decade from attending four-year colleges, according to a recent report by Congress's Advisory Committee on Student Financial Assistance.¹²⁶ The report focuses on students who have taken college preparatory courses and achieved qualifying grades and aptitude test scores.¹²⁷ Among students meeting those qualifications from low-income families—defined as families with incomes of less than \$25,000 a year¹²⁸—forty-eight percent do not go to four-year schools.¹²⁹ In addition, twenty-two percent of these students do not pursue any secondary education.¹³⁰ At the same time, only sixteen percent of such students from families with incomes between \$25,000 and \$49,999 do not go to a four-year school,¹³¹ and only four percent of students from families exceeding \$75,000 fail to attend any institutions of higher education.¹³² “The gap in participation between low- and upper-income students is the same as three decades years ago, . . . a period in which *Bakke*¹³³-style affirmative action has prevailed.”¹³⁴

The burden of college costs will fall hardest on students from families with incomes of less than \$50,000 a year, and these are disproportionately minority families.¹³⁵ The Advisory Committee reports that financial barriers are forcing students from low- and moderate-income families to take on excessive debt or work excessive hours.¹³⁶ The committee concludes with this sobering observation: “Without substantial increases in need-based grant aid, this chain of events [for needy students] is irreversible.”¹³⁷

By 2010 the number of qualified students from families with incomes below \$50,000 who will not attend four-year colleges within two years of

125. *Id.*

126. A REP. OF THE ADVISORY COMM. ON STUDENT FINANCIAL ASSISTANCE, EMPTY PROMISES: THE MYTH OF COLLEGE ACCESS IN AMERICA V (June 2002), <http://www.ed.gov/about/bdscomm/list/acsfa/emptypromises.pdf> [hereinafter EMPTY PROMISES].

127. *Id.* at 16.

128. *Id.* at 39 n.2.

129. *Id.* at 21.

130. *Id.*

131. *Id.* at 25.

132. *Id.* at 22.

133. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (footnote added).

134. Hall, *supra* note 114, at B20.

135. EMPTY PROMISES, *supra* note 126, at 3.

136. *Id.* at 11.

137. *Id.* at 31.

graduating high school will be 4.4 million.¹³⁸ The number who will not seek any post-secondary education will total two million.¹³⁹ “[S]mart poor kids go to college at the same rate as stupid rich kids, and that’s a tragedy.”¹⁴⁰

That is *the* crisis in higher education. And it is the echo, if you will, of the unresolved tension between legal and substantive equality raised in *Brown*. A tension that directly impacts students from historically under-represented groups, lower-income families, and families with little or no experience with higher education. It reminds us that the best way to address the vision of *Brown* is to ensure that *every* student seeking education—whether K–12 or higher education—can afford it and that the quality of the experience that they receive in less-noted schools and universities is comparable to that showered on students in elite institutions. “At least on the public side, the responsibility to do so rests squarely with the states that are now abandoning the social contract they forged with [public K–12 and] higher education long ago,”¹⁴¹ a contract that carries a codicil. That codicil calls for universities to keep tuition at a level that would not dampen access and in return states would provide subsidies, including direct financial aid.¹⁴²

That contract, however, is quickly dissolving as tough economic times and other demands, notably K–12, force choices that invariably pit higher education against public schools. As a result, higher education institutions that have historically provided access and opportunity increasingly will be unable to fulfill that role and maintain educational quality. Even if the full legacy of *Brown* were realized in the public schools, it is ironically becoming harder to realize in America’s universities and colleges.

In the end, *Brown* falls short because it could not and did not address the fundamental problem that levels of income should not determine levels of opportunity; equity and access must be significant components of a successful vision of educational equality. Fifty years after *Brown*, the fate of minority and other students, whether in K–12 or higher education, rests importantly but not conclusively on that decision. Better financial support and greater political—not just legal—will are what is needed to provide educational opportunities that will

138. *Id.* at 27.

139. *Id.*

140. Hall, *supra* note 114, at B20 (quoting Terry W. Hartle, Senior Vice President for Government and Public Affairs at ACE).

141. *Id.*

142. *Id.*

make the real difference.

V. EDUCATIONAL OPPORTUNITY

Then we come back to Alphonse Fletcher, Jr., the money manager and philanthropist, a private person who has made the largest gift by a black in American history.¹⁴³ The purpose of that gift was to improve race relations and to address the class divide between African Americans who have benefited from the civil rights movement and those who have not.¹⁴⁴ Mr. Fletcher hopes that his gift will “help continue the progress toward racial equality that the *Brown* decision started.”¹⁴⁵

While scholars may debate the meaning of *Brown* a half century later, there seems little doubt that without it there would not have been Mr. Fletcher’s gift and, most probably, his personal success. And for this reason, we celebrate *Brown*. Virtually everyone thinks the *Brown* decision was right, and that conclusion is unlikely to change when we reach the hundredth anniversary. But as Mr. Fletcher so clearly understands, full racial equality has not yet been achieved. There is no doubt that *Brown* should be celebrated for what it did most profoundly: condemn permanently the idea of white supremacy.

Yet in the very area to which it was directed—education—the results show that we have a long way to go. We have entered an era of high-stakes accountability for students and educators amidst one of the most unequal and racially segregated educational systems in the world. Guaranteeing equal access to schools is important, but since the Reagan administration found that our nation was at risk because of failing public schools, the emphasis has been on strict accountability systems measured by standardized tests.¹⁴⁶ The key strategy to bolster those scores has been to end policies designed to desegregate schools and instead replace them with free-market choice plans.¹⁴⁷

Unfortunately, in these and similar schemes, students—often African American and Latino students in poor urban and rural schools—are being punished for their lack of opportunity to learn

143. Rimer, *supra* note 1, at B2.

144. *Id.*

145. *Id.* (quoting Alphonse Fletcher, Jr.) (italics added).

146. Amy Stuart Wells, *Why Public Policy Fails to Live up to the Potential of Charter School Reform: An Introduction*, in *WHERE CHARTER SCHOOL POLICY FAILS* 1-28 (Amy Stuart Wells ed., 2002).

147. *Id.*

material on which they are being tested.¹⁴⁸ As Amy Stuart Wells, a leading scholar of school reform and financing reminds us, “We are now spending more dollars on prisons than public schools.”¹⁴⁹ To that extent, the promise of *Brown* has not been fulfilled, no matter its symbolic value.

It is time for a change, and a dramatic one. *Brown* the symbol has to be turned into *Brown* the reality. Failure to do so means the substantive promise of *Brown* will not be met in the next half-century, even with generosity on a scale as remarkable as that of Alphonse Fletcher, Jr.

148. John B. Diamond & James P. Spillance, *High-Stakes Accountability in Urban Elementary Schools: Challenging or Reproducing Inequality?*, 106 TCHRS. C. REC. 1145, 1145-76 (2004).

149. Rossell, *supra* note 31, at 16.